

 **ORIGINAL**

FILED
U.S. DISTRICT COURT

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Attorneys for The SCO Group, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant/Counterclaim-Plaintiff.

**PLAINTIFF'S RENEWED MOTION
TO COMPEL**

(ORAL ARGUMENT REQUESTED)

Case No. 2:03CV0294DAK
Honorable Dale A. Kimball
Magistrate Judge Brooke C. Wells

Plaintiff The SCO Group, Inc. (“SCO”) respectfully moves the Court pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure again to compel International Business Machines Corporation (“IBM”) to produce certain Court-ordered discovery.

In disregard of SCO’s long-standing discovery requests and the Court’s previous orders, IBM has withheld crucial Linux-contribution information.¹ In particular, and notwithstanding the Court’s most recent order to produce “ALL non-public Linux contribution information,” Order of April 19, 2005, at 5 (emphasis in original), IBM has withheld the development history of Linux contributions, including such documents (which the Court has already held discoverable) as programmer’s notes, design documents, white papers, and iterations, revisions, and interim versions of those contributions.

The deficiency in IBM’s production is obvious from the near-complete absence of documents concerning Linux-development work from IBM research “projects” publicly known to be platforms for staging submissions to Linux, as well as documents concerning IBM’s development work for, with, or on behalf of third parties that have made submissions to Linux. Although IBM has acknowledged that SCO’s interrogatories and production requests sought “*all* of its contributions and development work in Linux,” IBM Opp. to SCO Motion to Compel (11/19/03) at 3 (underline added), IBM has produced almost nothing concerning that development work.

¹ SCO brings this motion after the Court’s August 1, 2005 deadline for IBM to produce all required documents, and after having reviewed IBM’s production to date at length for any Linux-contribution development information. In light of the impending fact-discovery deadline, SCO has also served IBM with SCO’s Seventh Request for Production of Documents, which seeks in extremely specific language the same Linux-development information at issue in this Motion. While SCO has served the request out of an abundance of caution, SCO believes (as explained in this brief) that the materials at issue have already been requested by SCO and ordered by the Court.

SCO respectfully asks this Court to compel IBM to immediately produce all non-public information concerning IBM's Linux-development work, including programmer's notes, design documents, white papers, and iterations, revisions, and interim versions of code contributed to Linux, with respect to all of IBM's Linux contributions to the present.

SCO's Motion is supported by the Memorandum in Support of Plaintiff's Renewed Motion to Compel submitted concurrently herewith.

SCO respectfully requests that the Court hear oral argument on this Motion.

DATED this 2nd day of September, 2005.

Respectfully submitted,

HATCH, JAMES & DODGE, P.C.
Brent O. Hatch
Mark F. James

BOIES, SCHILLER & FLEXNER LLP
Robert Silver
Stuart H. Singer
Stephen N. Zack
Edward Normand

By 

Counsel for The SCO Group, Inc.

CERTIFICATION OF COMPLIANCE WITH MEET AND CONFER OBLIGATIONS

SCO counsel has made a good-faith effort to reach an agreement with IBM counsel on the matters set forth in this Motion. In addition to SCO's numerous attempts to reach an agreement before filing its previous discovery motions, just days before the Court-imposed deadline for IBM's complete production, in response to a letter from SCO counsel Edward Normand regarding the insufficiency of IBM's production, IBM confirmed its view that it has produced all the "non-public Linux contribution information" it is obligated to produce. See Letter dated July 19, 2005, from T. Shaughnessy to B. Hatch, at 1 (Exh. 1). In addition, on August 22, 2005, counsel for SCO specifically informed counsel for IBM of SCO's view that IBM is obligated to produce the information sought herein and asked whether IBM would produce that information. In response, IBM eventually declined to produce the information, both in writing, see Letter dated August 30, 2005, from T. Shaughnessy to E. Normand (Exh. 2), and during a teleconference with counsel for SCO on September 1, 2005.

DATED this 2nd day of September, 2005.

Respectfully submitted,

HATCH, JAMES & DODGE, P.C.

Brent O. Hatch

Mark F. James

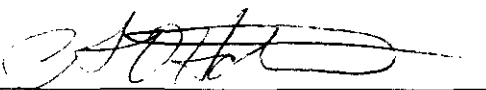
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Stephen N. Zack

Edward Normand

By 

Counsel for The SCO Group, Inc.

CERTIFICATE OF SERVICE

I hereby certifies that a true and correct copy of the foregoing Plaintiff's Renewed Motion to Compel was served by U.S. mail or hand delivery on Defendant International Business Machines Corporation on the 6th day of September, 2005:

By U.S. Mail:

David Marriott, Esq.
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019

Donald J. Rosenberg, Esq.
1133 Westchester Avenue
White Plains, New York 10604

By Hand Delivery:

Todd Shaughnessy, Esq.
Snell & Wilmer LLP
1200 Gateway Tower West
15 West South Temple
Salt Lake City, Utah 84101-1004

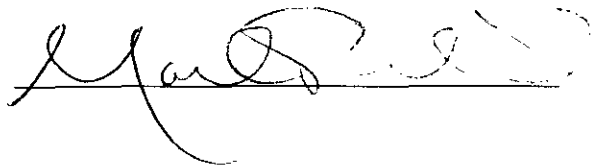
A handwritten signature in black ink, appearing to read "Todd Shaughnessy", written over a horizontal line.

EXHIBIT 1

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DENVER, COLORADO

LAS VEGAS, NEVADA

July 19, 2005

VIA FACSIMILE AND U.S. MAIL

Brent O. Hatch
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

Re: *SCO v. IBM; IBM v. SCO*

Dear Brent:

I write in response to Ted Normand's July 14, 2005 letter to David Marriott.

First, Ted's concern that IBM has withheld pre-1991 AIX source code is unfounded. To the extent there is AIX source code in CMVC that was written prior to 1991 and maintained in CMVC, we have produced it. We have repeatedly searched for, but have been unable to find, any pre-1991 AIX source code or revision control information other than that which may be in CMVC. Please provide us with the basis for Ted's statement: "Our information is that IBM does possess the source code for all versions of AIX prior to 1991". If you have any specific information about where source code for versions of AIX prior to 1991 are located within IBM, let us know and we will follow up on it.

Second, with respect to IBM's Linux contributions, the Court expressly ruled in an Order dated March 3, 2004 (and reaffirmed in its April 19, 2005 Order) that IBM is not required to produce to SCO information concerning IBM's Linux contributions insofar as such information is publicly available. The Court only ordered IBM to produce "all non-public Linux contribution information". (April 19, 2005 Order at 5-6.) As detailed in Peter Ligh's July 5 letter to Ted, IBM has fully complied with that obligation.

The issues you raise under the headings of "Approximately 245,325 Missing Files", "Approximately 152,887 Un-Catalogued Files", and "Removal of CMVC Change-Log History" require more investigation and analysis. Because some of the people at IBM who were involved in preparing the CMVC data for production to SCO several months ago are currently on vacation, I am unable to provide a response to those issues at this time. We will provide you with responses to those issues as soon as we can.

358674.1

Snell & Wilmer
LLP

Brent O. Hatch
July 19, 2005
Page 2

Very truly yours,


Todd M. Shaughnessy

TMS:dw
cc: Edward Normand
David Marriott
Peter Ligh
Amy Sorenson

EXHIBIT 2

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August 30, 2005

VIA FACSIMILE AND U.S. MAIL

Edward Normand
BOIES, SCHILLER & FLEXNER LLP
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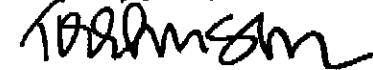
Re: SCO v. IBM; IBM v. SCO

Dear Ted:

Following up on our telephone call, this will confirm that any patches IBM contributed to Linux were and are publicly available. After the website www-124.ibm.com was taken down, any new contributions that would have been posted there were instead posted on other, project-specific (and publicly accessible) websites. Of course, all of IBM's Linux contributions are by nature publicly accessible, regardless of whether they were posted to an IBM website. As far as the programmers notes and similar documents for all of IBM's Linux contributions, we objected to the only document request that arguably sought this information (Request No. 35) as overly-broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, in large part because SCO refused to identify any particular Linux contribution for which it sought this type of information. Notwithstanding these objections, we have produced thousands of documents related to IBM's Linux contributions, including the types of documents you identify.

I trust this answers your questions. If not, please let me know. Thank you.

Very truly yours,



Todd M. Shaughnessy

TMS:dw

cc: Brent Hatch
David Marriott
Peter Ligh
Amy Sorenson

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